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No. 87-1214

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL COTTONSEED PRODUCTS ASSOCIATION,
Petitioner,

v.

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

CARL W. VOGT *
KEITH A. JONES
CAROL BARTHEL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

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REPLY MEMORANDUM

The question in this case is whether section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b), authorizes the Secretary of Labor to promulgate an occupational health standard requiring medical examination and testing of employees in the absence of a finding that current (or even likely future) conditions in the workplace pose a significant risk of material health impairment. The government's brief in opposition does not speak to this question of statutory construction. Instead, the government argues as a matter of policy that the Secretary should have that authority. That argument misses the point of this case and is addressed to the wrong forum (and also is wrong).

This Court already has spoken to the question of statutory construction presented here. In *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 642 (1980), a plurality of the Court construed the Act as requiring the Secretary to make a threshold finding of significant risk "before [s]he can promulgate *any* permanent health or safety standard" (emphasis in original). The government does not even acknowledge that holding, let alone discuss its implications for this case. Nowhere does the government attempt to explain how the Act could be read in a manner that exempts occupational health standards relating to medical examination and testing from a requirement that applies to *all* occupational health standards.

Instead of coming to grips with the actual holding of *Industrial Union Department*, the government attempts to take refuge in a passage from the plurality opinion that it calls " 'unusually precise' dictum." Br. in Opp. at 8.[1] That passage merely explains that medical monitoring may be used as a "backstop" to an otherwise valid permissible exposure level. This means that the finding of significant risk that justifies the imposition of a permissible exposure level may also warrant an ancillary requirement of medical examination and testing. It does not mean that the Secretary may require such examination and testing in the absence of a finding of significant risk and when no permissible exposure limit has been imposed.

The government also fails to come to grips with the implications of *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398 (5th Cir. 1980). In that case, the Fifth Circuit squarely held that medical examination and testing may not be required in the absence of a "finding of a significant risk of material health impairment." *Id.* at 407. The government offers two grounds for distinguishing that decision, neither of which has any merit.

[1] Citations to the brief in opposition are to the typescript version.

First, the government suggests that the cases can be distinguished because in *Texas Independent Ginners* the Secretary had "imposed a number of work practices and other protective measures in addition to medical testing." Br. in Opp. at 11. That is a distinction without a difference. The Fifth Circuit squarely addressed the question of medical testing, which was the principal health standard at issue in the case, and expressly held that such testing could not be required in the absence of significant risk. There is no logical basis for suggesting that the result would have been different if medical testing had been the only health standard at issue.

Second, the government argues that the Fifth Circuit "had no occasion to consider the circumstances under which a Section 6(a) exposure limit could properly be revoked or the link between revocation of a Section 6(a) limit and retention of medical monitoring as a backstop to that determination." Br. in Opp. at 12. The court below also had no occasion to consider, and in fact did not consider, the circumstances under which a section 6(a) exposure limit could be revoked; no one had challenged the Secretary's revocation of the section 6(a) limit of 1000 ug m^3 on exposure to all cotton dust. In this context the government's argument about "backstop" is pure bootstrap. If, as *Industrial Union Department* and *Texas Independent Ginners* hold, an occupational health standard under section 6(b) must rest upon a finding of significant risk of material health impairment, it makes no difference that a section 6(a) standard is being withdrawn.

The court below, as the government recognizes, has replaced the requirement of a threshold finding of significant risk with the watered-down requirement of a finding of "residual risk." Br. in Opp. at 8. This lower standard permits the Secretary to exercise a power that is denied to her both by the plurality opinion in *Industrial Union Department* and the Fifth Circuit's opinion

in *Texas Independent Ginners*. It enables the Secretary to say "I suspect (but do not know) that exposure to cotton dust [or some other substance] may pose a significant risk of material health impairment at levels considerably higher than those currently being experienced at the workplace, and I therefore am going to demand expensive and burdensome medical examination and testing even though I am unable to find that exposure at current or reasonably foreseeable future levels in fact poses such a risk."

Congress withheld that power from the Secretary, and rightly so. It is not reasonable or appropriate to saddle the employer with the expense and burden of medical monitoring when, as in this case, the Secretary only *suspects* that exposure may be risky at levels *considerably* higher than those either ever experienced in the past in the United States or likely to be experienced in the future.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

CARL W. VOGT *
KEITH A. JONES
CAROL BARTHEL
FULBRIGHT & JAWORSKI
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Washington, D.C. 20036
(202) 452-6800

* Counsel of Record